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AMENDED IN ASSEMBLY MAY 2, 2013

AMENDED IN ASSEMBLY APRIL 22, 2013

AMENDED IN ASSEMBLY APRIL 3, 2013

CALIFORNIA LEGISLATURE—2013–14 REGULAR SESSION

ASSEMBLY BILL

No. 401

Introduced by Assembly Member Daly
(Coauthor: Assembly Member Linder)
(Coauthor: Senator Correa)

February 15, 2013

An act to add and repeal Chapter 6.5 (commencing with Section 6820) of Part 1 of Division 2 of the Public Contract Code, ~~and to amend Section 143 of~~, and to add and repeal Section 91.2 ~~of~~, of the Streets and Highways Code, relating to transportation, and making an appropriation therefor.

LEGISLATIVE COUNSEL'S DIGEST

AB 401, as amended, Daly. Transportation: design-build: streets and highways.

Existing law, until January 1, 2014, authorizes certain state and local transportation entities, if authorized by the California Transportation Commission, to use a design-build process for contracts on transportation projects, as specified. Existing law establishes a procedure for submitting bids that includes a requirement that design-build entities

provide a statement of qualifications submitted to the transportation entity that is verified under oath, subject to penalty of perjury.

This bill would authorize the Department of Transportation to utilize design-build procurement for up to 10 projects on the state highway system, based on either best value or lowest responsible bid. The bill would authorize regional transportation agencies, as defined, to utilize design-build procurement for projects on streets, roads, or the state highway system. The bill would repeal these provisions on January 1, 2024, or one year from the date that the Department of Transportation posts on its Internet Web site that the provisions related to the construction inspection services of these projects are invalid. The bill would provide that these design-build authorizations do not include construction inspection services for projects on or interfacing with the state highway system. The bill would require the Department of Transportation to perform construction inspection services for projects on or interfacing with the state highway system, as specified. The bill would require a transportation entity, as defined, awarding a contract for a public works project pursuant to these provisions, to reimburse the Department of Industrial Relations for costs of performing prevailing wage monitoring and enforcement of the public works project and would require moneys collected to be deposited into the State Public Works Enforcement Fund, a continuously appropriated fund. By depositing money in a continuously appropriated fund, the bill would make an appropriation.

~~Because the~~

~~The bill would extend the use of design-build procurement to regional transportation entities, agencies, as defined, and extend the period of time for which the Department of Transportation may use design-build procurement, subject to existing procedures, the procedures. The bill would, by extension, impose the statement of qualifications requirement upon regional transportation entities, agencies and the department, subject to penalty of perjury, thereby creating a new crime and imposing a state-mandated local program.~~

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: yes. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

SECTION 1. The Legislature finds and declares the following:

(a) The Department of Transportation has statutory authority over the state highway system, including possession, control, and responsibility for improvements to and maintenance of that system.

(b) The Department of Transportation is authorized to construct and maintain detours as may be necessary to facilitate movement of traffic where state highways are closed or obstructed by construction or otherwise.

(c) The Department of Transportation and any county, city, or public entity are authorized to enter into a contract with respect to the sharing of the expense of the acquisition, construction, improvement, or maintenance of any state highway.

(d) When an improvement to a portion of a state highway is completed by a local entity, the control of that portion of the state highway reverts to the state and the state is liable for its future maintenance and care.

SEC. 2. It is the intent of the Legislature to do the following:

(a) Authorize the Department of Transportation and regional transportation agencies to undertake improvements on streets and highways using design-build procurement.

(b) Reserve for the Department of Transportation the authority to perform construction inspection services.

(c) Require the Department of Transportation to be responsible for ensuring that uniform safety standards are met on public works of improvement on the state highway system.

SEC. 3. Chapter 6.5 (commencing with Section 6820) is added to Part 1 of Division 2 of the Public Contract Code, to read:

CHAPTER 6.5. TRANSPORTATION DESIGN-BUILD PROGRAM

6820. For purposes of this chapter, the following definitions apply:

(a) "Best value" means a value determined by objective criteria, including, but not limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the transportation entity.

(b) "Commission" means the California Transportation Commission.

1 (c) “Design-build” means a procurement process in which both
2 the design and construction of a project are procured from a single
3 entity.

4 (d) “Design-build entity” means a partnership, corporation, or
5 other legal entity that is able to provide appropriately licensed
6 contracting, architectural, and engineering services as needed
7 pursuant to a design-build contract.

8 (e) “Design-build team” means the design-build entity itself
9 and the individuals and other entities identified by the design-build
10 entity as members of its team.

11 (f) “Department” means the Department of Transportation as
12 established under Part 5 (commencing with Section 14000) of
13 Division 3 of Title 2 of the Government Code.

14 (g) “Interfacing with the state highway system” means work
15 performed within the state highway right-of-way, including
16 airspace over or under that property, or work performed upon
17 property acquired by the department for construction of a state
18 highway, including airspace over or under that property.

19 (h) “Regional transportation agency” means ~~a regional~~
20 ~~transportation agency as defined in paragraph (4) of subdivision~~
21 ~~(a) of Section 143 of the Streets and Highways Code.~~ *any of the*
22 *following:*

23 (1) *A transportation planning agency described in Section 29532*
24 *or 29532.1 of the Government Code.*

25 (2) *A county transportation commission established under*
26 *Section 130050, 130050.1, or 130050.2 of the Public Utilities*
27 *Code.*

28 (3) *Any other local or regional transportation entity that is*
29 *designated by statute as a regional transportation agency.*

30 (4) *A joint exercise of powers authority established pursuant to*
31 *Chapter 5 (commencing with Section 6500) of Division 7 of Title*
32 *1 of the Government Code, with the consent of a transportation*
33 *planning agency or a county transportation commission for the*
34 *jurisdiction in which the transportation project will be developed.*

35 (5) *A local transportation authority designated pursuant to*
36 *Division 12.5 (commencing with Section 131000) or Division 19*
37 *(commencing with Section 180000) of the Public Utilities Code.*

38 (6) *The Santa Clara Valley Transportation Authority established*
39 *pursuant to Part 12 (commencing with Section 100000) of Division*
40 *10 of the Public Utilities Code.*

1 (i) "Transportation entity" means the department or a regional
2 transportation agency.

3 6821. (a) The department may utilize the design-build method
4 of procurement for up to 10 projects on the state highway system,
5 based on either best value or lowest responsible bid.

6 (b) A regional transportation agency may utilize the design-build
7 method of procurement to design and construct projects on streets,
8 roads, or the state highway system, based on either best value or
9 lowest responsible bid. A regional transportation agency and the
10 department shall enter into a cooperative agreement reflecting the
11 roles and responsibilities assigned by law for a project on or
12 interfacing with the state highway system authorized under this
13 subdivision. The cooperative agreement shall also include the
14 requirement to develop a mutually agreed upon issue resolution
15 process with a primary objective to ensure the project stays on
16 schedule and issues between the parties are resolved in a timely
17 manner.

18 (c) The design-build authorization in subdivisions (a) and (b)
19 shall not include the authority to perform construction inspection
20 services for projects on or interfacing with the state highway
21 system, which shall be performed by the department consistent
22 with Section 91.2 of the Streets and Highway Code.

23 (d) (1) Not later than the first day of July that occurs two years
24 after a design-build contract is awarded, and each July 1 thereafter
25 until a project is completed, the department or the regional
26 transportation agency shall submit a report on the progress of the
27 project and compliance with this section to the legislative policy
28 committees having jurisdiction over transportation matters.

29 (2) The requirement of submitting a report imposed under
30 paragraph (1) is inoperative on the first day of July four years after
31 the first report was submitted, pursuant to Section 10231.5 of the
32 Government Code.

33 (3) A report to be submitted pursuant to paragraph (1) shall be
34 submitted in compliance with Section 9795 of the Government
35 Code.

36 6822. The commission shall use the guidelines developed
37 pursuant to subdivision (e) of Section 6803, as it read on December
38 31, 2013, to provide a standard organizational conflict-of-interest
39 policy, consistent with applicable law, regarding the ability of a
40 person or entity, that performs services for the transportation entity

1 relating to the solicitation of a design-build project, to submit a
2 proposal as a design-build entity, or to join a design-build team.
3 This conflict-of-interest policy shall apply to the transportation
4 entity entering into design-build contracts authorized under this
5 chapter.

6 6823. (a) For contracts for public works projects awarded prior
7 to the effective date of the regulations adopted by the Department
8 of Industrial Relations pursuant to subdivision (g) of Section 1771.5
9 of the Labor Code, a transportation entity authorized to use the
10 design-build method of procurement shall establish and enforce a
11 labor compliance program containing the requirements outlined
12 in Section 1771.5 of the Labor Code or shall contract with a third
13 party to operate a labor compliance program containing the
14 requirements outlined in Section 1771.5 of the Labor Code. This
15 requirement shall not apply to projects where the transportation
16 entity or design-build entity has entered into any collective
17 bargaining agreement that binds all of the contractors performing
18 work on the projects.

19 (b) For contracts for public works projects awarded on or after
20 the effective date of the regulations adopted by the Department of
21 Industrial Relations pursuant to subdivision (g) of Section 1771.5
22 of the Labor Code, the transportation entity shall reimburse the
23 Department of Industrial Relations for its reasonable and directly
24 related costs of performing prevailing wage monitoring and
25 enforcement on public works projects pursuant to rates established
26 by the Department of Industrial Relations as set forth in subdivision
27 (h) of Section 1771.5 of the Labor Code. All moneys collected
28 pursuant to this subdivision shall be deposited in the State Public
29 Works Enforcement Fund, created by Section 1771.3 of the Labor
30 Code, and shall be used only for enforcement of prevailing wage
31 requirements on those projects.

32 (c) In lieu of reimbursing the Department of Industrial Relations
33 for its reasonable and directly related costs of performing
34 monitoring and enforcement on public works projects, the
35 transportation entity may either (1) elect to continue operating an
36 existing previously approved labor compliance program to monitor
37 and enforce prevailing wage requirements on the project if it has
38 not contracted with a third party to conduct its labor compliance
39 program and requests and receives approval from the department
40 to continue its existing program or (2) enter into a collective

1 bargaining agreement that binds all of the contractors performing
2 work on the project and that includes a mechanism for resolving
3 disputes about the payment of wages.

4 6824. The procurement process for the design-build project
5 shall progress as follows:

6 (a) A transportation entity shall prepare a set of documents
7 setting forth the scope and estimated price of a project. The
8 documents may include, but need not be limited to, the size, type,
9 and desired design character of the project, performance
10 specifications covering the quality of materials, equipment,
11 workmanship, preliminary plans, and any other information deemed
12 necessary to describe adequately the transportation entity's needs.
13 The performance specifications and any plans shall be prepared
14 by a design professional who is duly licensed and registered in
15 California.

16 (b) Based on the documents prepared as described in subdivision
17 (a), the transportation entity shall prepare a request for proposals
18 that invites interested parties to submit competitive sealed proposals
19 in the manner prescribed by the transportation entity. The request
20 for proposals shall include, but need not be limited to, the following
21 elements:

22 (1) Identification of the basic scope and needs of the project or
23 contract, the estimated cost of the project, the methodology that
24 will be used by the transportation entity to evaluate proposals,
25 whether the contract will be awarded on the basis of the lowest
26 responsible bid or on best value, and any other information deemed
27 necessary by the transportation entity to inform interested parties
28 of the contracting opportunity.

29 (2) Significant factors that the transportation entity reasonably
30 expects to consider in evaluating proposals, including, but not
31 limited to, cost or price and all nonprice-related factors.

32 (3) The relative importance or the weight assigned to each of
33 the factors identified in the request for proposals.

34 (4) For transportation entities authorized to utilize best value
35 as a selection method, the transportation entity reserves the right
36 to request proposal revisions and hold discussions and negotiations
37 with responsive bidders and shall so specify in the request for
38 proposals and shall publish separately or incorporate into the
39 request for proposals applicable rules and procedures to be

1 observed by the transportation entity to ensure that any discussions
2 or negotiations are conducted in good faith.

3 (c) Based on the documents prepared under subdivision (a), the
4 transportation entity shall prepare and issue a request for
5 qualifications in order to prequalify the design-build entities whose
6 proposals shall be evaluated for final selection. The request for
7 qualifications shall include, but need not be limited to, the
8 following elements:

9 (1) Identification of the basic scope and needs of the project or
10 contract, the expected cost range, the methodology that will be
11 used by the transportation entity to evaluate proposals, the
12 procedure for final selection of the design-build entity, and any
13 other information deemed necessary by the transportation entity
14 to inform interested parties of the contracting opportunity.

15 (2) (A) Significant factors that the transportation entity
16 reasonably expects to consider in evaluating qualifications,
17 including technical design and construction expertise, skilled labor
18 force availability, and all other nonprice-related factors.

19 (B) For purposes of subparagraph (A), skilled labor force
20 availability shall be determined by the existence of an agreement
21 with a registered apprenticeship program, approved by the
22 California Apprenticeship Council, that has graduated at least one
23 apprentice in each of the preceding five years. This graduation
24 requirement shall not apply to programs providing apprenticeship
25 training for any craft that was first deemed by the Department of
26 Labor and the Department of Industrial Relations to be an
27 apprenticeable craft within the five years prior to the effective date
28 of this article.

29 (3) A standard form request for statements of qualifications
30 prepared by the transportation entity. In preparing the standard
31 form, the transportation entity may consult with the construction
32 industry, the building trades and surety industry, and other public
33 agencies interested in using the authorization provided by this
34 chapter. The standard form shall require information including,
35 but not limited to, all of the following:

36 (A) If the design-build entity is a partnership, limited
37 partnership, joint venture, or other association, a listing of all of
38 the partners, general partners, or association members known at
39 the time of statement of qualification submission who will
40 participate in the design-build contract.

1 (B) Evidence that the members of the design-build entity have
2 completed, or demonstrated the experience, competency, capability,
3 and capacity to complete projects of similar size, scope, or
4 complexity, and that proposed key personnel have sufficient
5 experience and training to competently manage and complete the
6 design and construction of the project, and a financial statement
7 that assures the transportation entity that the design-build entity
8 has the capacity to complete the project.

9 (C) The licenses, registration, and credentials required to design
10 and construct the project, including, but not limited to, information
11 on the revocation or suspension of any license, credential, or
12 registration.

13 (D) Evidence that establishes that the design-build entity has
14 the capacity to obtain all required payment and performance
15 bonding, liability insurance, and errors and omissions insurance.

16 (E) Information concerning workers' compensation experience
17 history and a worker safety program.

18 (F) A full disclosure regarding all of the following that are
19 applicable:

20 (i) Any serious or willful violation of Part 1 (commencing with
21 Section 6300) of Division 5 of the Labor Code or the federal
22 Occupational Safety and Health Act of 1970 (Public Law 91-596),
23 settled against any member of the design-build entity.

24 (ii) Any debarment, disqualification, or removal from a federal,
25 state, or local government public works project.

26 (iii) Any instance where the design-build entity, or its owners,
27 officers, or managing employees submitted a bid on a public works
28 project and were found to be nonresponsive or were found by an
29 awarding body not to be a responsible bidder.

30 (iv) Any instance where the design-build entity, or its owners,
31 officers, or managing employees defaulted on a construction
32 contract.

33 (v) Any violations of the Contractors' State License Law, as
34 described in Chapter 9 (commencing with Section 7000) of
35 Division 3 of the Business and Professions Code, including alleged
36 violations of federal or state law regarding the payment of wages,
37 benefits, apprenticeship requirements, or personal income tax
38 withholding, or Federal Insurance Contribution Act (FICA)
39 withholding requirements settled against any member of the
40 design-build entity.

1 (vi) Any bankruptcy or receivership of any member of the
2 design-build entity, including, but not limited to, information
3 concerning any work completed by a surety.

4 (vii) Any settled adverse claims, disputes, or lawsuits between
5 the owner of a public works project and any member of the
6 design-build entity during the five years preceding submission of
7 a bid under this article, in which the claim, settlement, or judgment
8 exceeds fifty thousand dollars (\$50,000). Information shall also
9 be provided concerning any work completed by a surety during
10 this five-year period.

11 (G) If the proposed design-build entity is a partnership, limited
12 partnership, joint-venture, or other association, a copy of the
13 organizational documents or agreement committing to form the
14 organization, and a statement that all general partners, joint venture
15 members, or other association members agree to be fully liable for
16 the performance under the design-build contract.

17 (H) An acceptable safety record. A bidder's safety record shall
18 be deemed acceptable if its experience modification rate for the
19 most recent three-year period is an average of 1.00 or less, and its
20 average total recordable injury/illness rate and average lost work
21 rate for the most recent three-year period does not exceed the
22 applicable statistical standards for its business category or if the
23 bidder is a party to an alternative dispute resolution system as
24 provided for in Section 3201.5 of the Labor Code.

25 (4) The information required under this subdivision shall be
26 verified under oath by the design-build entity and its members in
27 the manner in which civil pleadings in civil actions are verified.
28 Information required under this subdivision that is not a public
29 record under the California Public Records Act, as described in
30 Chapter 3.5 (commencing with Section 6250) of Division 7 of
31 Title 1 of the Government Code, shall not be open to public
32 inspection.

33 (d) For those projects utilizing low bid as the final selection
34 method, the competitive bidding process shall result in lump-sum
35 bids by the prequalified design-build entities. Awards shall be
36 made to the lowest responsible bidder.

37 (e) For those projects utilizing best value as a selection method,
38 the design-build competition shall progress as follows:

39 (1) Competitive proposals shall be evaluated by using only the
40 criteria and selection procedures specifically identified in the

1 request for proposals. However, the following minimum factors
2 shall be weighted as deemed appropriate by the contracting
3 transportation entity:

4 (A) Price.

5 (B) Technical design and construction expertise.

6 (C) Life-cycle costs over 15 years or more.

7 (2) Pursuant to subdivision (b), the transportation entity may
8 hold discussions or negotiations with responsive bidders using the
9 process articulated in the transportation entity's request for
10 proposals.

11 (3) When the evaluation is complete, the top three responsive
12 bidders shall be ranked sequentially based on a determination of
13 value provided.

14 (4) The award of the contract shall be made to the responsible
15 bidder whose proposal is determined by the transportation entity
16 to have offered the best value to the public.

17 (5) Notwithstanding any other provision of this code, upon
18 issuance of a contract award, the transportation entity shall publicly
19 announce its award, identifying the contractor to whom the award
20 is made, along with a written decision supporting its contract award
21 and stating the basis of the award. The notice of award shall also
22 include the transportation entity's second- and third-ranked
23 design-build entities.

24 (6) The written decision supporting the transportation entity's
25 contract award, described in paragraph (5), and the contract file
26 shall provide sufficient information to satisfy an external audit.

27 6825. (a) The design-build entity shall provide payment and
28 performance bonds for the project in the form and in the amount
29 required by the transportation entity, and issued by a California
30 admitted surety. In no case shall the amount of the payment bond
31 be less than the amount of the performance bond.

32 (b) The design-build contract shall require errors and omissions
33 insurance coverage for the design elements of the project.

34 6826. (a) The transportation entity, in each design-build request
35 for proposals, may identify specific types of subcontractors that
36 must be included in the design-build entity statement of
37 qualifications and proposal. All construction subcontractors that
38 are identified in the proposal shall be afforded all the protections
39 of Chapter 4 (commencing with Section 4100) of Part 1 of Division
40 2.

(b) In awarding subcontracts not listed in the request for proposals, the design-build entity shall do all of the following:

(1) Provide public notice of availability of work to be subcontracted in accordance with the publication requirements applicable to the competitive bidding process of the transportation entity.

(2) Provide a fixed date and time on which the subcontracted work will be awarded.

(3) Establish reasonable qualification criteria and standards.

(4) Provide that the subcontracted construction work shall be awarded either on a best value basis or to the lowest responsible bidder. For construction work awarded on a best value basis, the design-build entity shall evaluate all bids utilizing the factors described in paragraph (1) of subdivision (e) of Section 6824, and shall award the contract to the bidder determined by the design-build entity to have offered the best value.

(c) Subcontractors awarded subcontracts under this chapter shall be afforded all the protections of Chapter 4 (commencing with Section 4100) of Part 1 of Division 2.

6827. Nothing in this chapter affects, expands, alters, or limits any rights or remedies otherwise available at law.

6828. The provisions of this chapter are severable. If any provision of this chapter or its application is held invalid, that invalidity shall not affect other provisions or applications that can be given effect without the invalid provision or application.

6829. (a) This chapter shall remain in effect only until January 1, 2024, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2024, deletes or extends that date.

(b) Notwithstanding subdivision (a), if any provision or application of Section 91.2 of the Streets and Highways Code is held invalid by a court of competent jurisdiction, this chapter shall be repealed one year from the date in which the department posts on its Internet Web site that Section 91.2 of the Streets and Highways Code has been held invalid.

(c) The repeal of this chapter shall not affect an executed design-build contract or cooperative agreement entered into pursuant to this chapter prior to the date of its repeal, regardless of the stage of the project at the time of repeal.

SEC. 4. Section 91.2 is added to the Streets and Highways Code, to read:

91.2. (a) The department shall perform construction inspection services for projects on or interfacing with the state highway system authorized pursuant to Chapter 6.5 (commencing with Section 6820) of Part 1 of Division 2 of the Public Contract Code. The department shall use department employees or consultants under contract with the department to perform the services described in this subdivision and subdivision (b), consistent with Article XXII of the California Constitution. Construction inspection services performed by the department for those ~~projects~~, *projects* include, but are not limited to, material source testing, certification testing, surveying, monitoring of environmental compliance, independent quality control testing and inspection, and quality assurance audits. The construction inspection duties and responsibilities of the department shall include a direct reporting relationship between the inspectors and senior department engineers responsible for all inspectors and construction inspection services. The senior department engineer responsible for construction inspection services shall be responsible for the acceptance or rejection of the work.

(b) Notwithstanding any other law, the department shall retain the authority to stop the contractor's operation wholly or in part and take appropriate action when public safety is jeopardized on a project on or interfacing with the state highway system authorized pursuant to Chapter 6.5 (commencing with Section 6820) of Part 1 of Division 2 of the Public Contract Code. The department shall ensure that public safety and convenience is maintained whenever work is performed under an encroachment permit within the state highway right-of-way, including, but not limited to, work performed that includes lane closures, signing, work performed at night, detours, dust control, temporary pavement quality, crash cushions, temporary railings, pavement transitions, falsework, shoring, and delineation. The department shall regularly inspect the job sites for safety compliance and any possible deficiencies. If any deficiency is observed, a written notice shall be sent by the department to the regional transportation agency's designated resident engineer to correct the deficiency. Once the deficiency is corrected, a written notice describing the resolution of the deficiency shall be sent to the department and documented.

(c) The department shall use department employees or consultants under contract with the department to perform the services described in subdivisions (a) and (b), consistent with Article XXII of the California Constitution. Department employee and consultant resources necessary for the performance of those services, including personnel requirements, shall be included in the department's capital outlay support program for workload purposes in the annual Budget Act.

(d) This section shall remain in effect only until January 1, 2024, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2024, deletes or extends that date.

(e) If any provision or application of this section is held invalid by a court of competent jurisdiction, the department shall post on its Internet Web site within 10 business days of the decision of invalidity that this section has been held invalid.

~~SEC. 5. Section 143 of the Streets and Highways Code is amended to read:~~

~~143. (a) (1) "Best value" means a value determined by objective criteria, including, but not limited to, price, features, functions, life-cycle costs, and other criteria deemed appropriate by the department or the regional transportation agency.~~

~~(2) "Contracting entity or lessee" means a public or private entity, or consortia thereof, that has entered into a comprehensive development lease agreement with the department or a regional transportation agency for a transportation project pursuant to this section.~~

~~(3) "Design-build" means a procurement process in which both the design and construction of a project are procured from a single entity.~~

~~(4) "Regional transportation agency" means any of the following:~~

~~(A) A transportation planning agency as defined in Section 29532 or 29532.1 of the Government Code.~~

~~(B) A county transportation commission as defined in Section 130050, 130050.1, or 130050.2 of the Public Utilities Code.~~

~~(C) Any other local or regional transportation entity that is designated by statute as a regional transportation agency.~~

~~(D) A joint exercise of powers authority as defined in Chapter 5 (commencing with Section 6500) of Division 7 of Title 1 of the Government Code, with the consent of a transportation planning~~

1 agency or a county transportation commission for the jurisdiction
2 in which the transportation project will be developed.

3 ~~(E) A local transportation authority designated pursuant to~~
4 ~~Division 19 (commencing with Section 180000) of the Public~~
5 ~~Utilities Code.~~

6 ~~(F) The Santa Clara Valley Transportation Authority established~~
7 ~~pursuant to Part 12 (commencing with Section 100000) of Division~~
8 ~~10 of the Public Utilities Code.~~

9 ~~(5) “Public Infrastructure Advisory Commission” means a unit~~
10 ~~or auxiliary organization established by the Business,~~
11 ~~Transportation and Housing Agency that advises the department~~
12 ~~and regional transportation agencies in developing transportation~~
13 ~~projects through performance-based infrastructure partnerships.~~

14 ~~(6) “Transportation project” means one or more of the following:~~
15 ~~planning, design, development, finance, construction,~~
16 ~~reconstruction, rehabilitation, improvement, acquisition, lease,~~
17 ~~operation, or maintenance of highway, public street, rail, or related~~
18 ~~facilities supplemental to existing facilities currently owned and~~
19 ~~operated by the department or regional transportation agencies~~
20 ~~that is consistent with the requirements of subdivision (c).~~

21 ~~(b) (1) The Public Infrastructure Advisory Commission shall~~
22 ~~do all of the following:~~

23 ~~(A) Identify transportation project opportunities throughout the~~
24 ~~state.~~

25 ~~(B) Research and document similar transportation projects~~
26 ~~throughout the state, nationally, and internationally, and further~~
27 ~~identify and evaluate lessons learned from these projects.~~

28 ~~(C) Assemble and make available to the department or regional~~
29 ~~transportation agencies a library of information, precedent,~~
30 ~~research, and analysis concerning infrastructure partnerships and~~
31 ~~related types of public-private transactions for public infrastructure.~~

32 ~~(D) Advise the department and regional transportation agencies,~~
33 ~~upon request, regarding infrastructure partnership suitability and~~
34 ~~best practices.~~

35 ~~(E) Provide, upon request, procurement-related services to the~~
36 ~~department and regional transportation agencies for infrastructure~~
37 ~~partnership.~~

38 ~~(2) The Public Infrastructure Advisory Commission may charge~~
39 ~~a fee to the department and regional transportation agencies for~~
40 ~~the services described in subparagraphs (D) and (E) of paragraph~~

1 (1), the details of which shall be articulated in an agreement entered
2 into between the Public Infrastructure Advisory Commission and
3 the department or the regional transportation agency.

4 (e) (1) Notwithstanding any other provision of law, only the
5 department, in cooperation with regional transportation agencies,
6 and regional transportation agencies, may solicit proposals, accept
7 unsolicited proposals, negotiate, and enter into comprehensive
8 development lease agreements with public or private entities, or
9 consortia thereof, for transportation projects.

10 (2) Projects proposed pursuant to this section and associated
11 lease agreements shall be submitted to the California Transportation
12 Commission. The commission, at a regularly scheduled public
13 hearing, shall select the candidate projects from projects nominated
14 by the department or a regional transportation agency after
15 reviewing the nominations for consistency with paragraphs (3)
16 and (4). Approved projects may proceed with the process described
17 in paragraph (5).

18 (3) The projects authorized pursuant to this section shall be
19 primarily designed to achieve the following performance
20 objectives:

21 (A) Improve mobility by improving travel times or reducing
22 the number of vehicle hours of delay in the affected corridor.

23 (B) Improve the operation or safety of the affected corridor.

24 (C) Provide quantifiable air quality benefits for the region in
25 which the project is located.

26 (4) In addition to meeting the requirements of paragraph (3),
27 the projects authorized pursuant to this section shall address a
28 known forecast demand, as determined by the department or
29 regional transportation agency.

30 (5) At least 60 days prior to executing a final lease agreement
31 authorized pursuant to this section, the department or regional
32 transportation agency shall submit the agreement to the Legislature
33 and the Public Infrastructure Advisory Commission for review.
34 Prior to submitting a lease agreement to the Legislature and the
35 Public Infrastructure Advisory Commission, the department or
36 regional transportation agency shall conduct at least one public
37 hearing at a location at or near the proposed facility for purposes
38 of receiving public comment on the lease agreement. Public
39 comments made during this hearing shall be submitted to the
40 Legislature and the Public Infrastructure Advisory Commission

1 with the lease agreement. The Secretary of Business, Transportation
2 and Housing or the chairperson of the Senate or Assembly fiscal
3 committees or policy committees with jurisdiction over
4 transportation matters may, by written notification to the
5 department or regional transportation agency, provide any
6 comments about the proposed agreement within the 60-day period
7 prior to the execution of the final agreement. The department or
8 regional transportation agency shall consider those comments prior
9 to executing a final agreement and shall retain the discretion for
10 executing the final lease agreement.

11 (d) For the purpose of facilitating those projects, the agreements
12 between the parties may include provisions for the lease of
13 rights-of-way in, and airspace over or under, highways, public
14 streets, rail, or related facilities for the granting of necessary
15 easements, and for the issuance of permits or other authorizations
16 to enable the construction of transportation projects. Facilities
17 subject to an agreement under this section shall, at all times, be
18 owned by the department or the regional transportation agency,
19 as appropriate. For department projects, the commission shall
20 certify the department's determination of the useful life of the
21 project in establishing the lease agreement terms. In consideration
22 therefor, the agreement shall provide for complete reversion of the
23 leased facility, together with the right to collect tolls and user fees,
24 to the department or regional transportation agency, at the
25 expiration of the lease at no charge to the department or regional
26 transportation agency. At the time of the reversion, the facility
27 shall be delivered to the department or regional transportation
28 agency, as applicable, in a condition that meets the performance
29 and maintenance standards established by the department or
30 regional transportation agency and that is free of any encumbrance,
31 lien, or other claims.

32 (e) Agreements between the department or regional
33 transportation agency and the contracting entity or lessee shall
34 authorize the contracting entity or lessee to use a design-build
35 method of procurement for transportation projects, subject to the
36 requirements for utilizing such a method contained in Chapter 6.5
37 (commencing with Section 6800) of Part 1 of Division 2 of the
38 Public Contract Code, other than Sections 6802, 6803, and 6813
39 of that code, if those provisions are enacted by the Legislature

1 during the 2009–10 Regular Session, or a 2009–10 extraordinary
2 session.

3 (f) (1) (A) Notwithstanding any other provision of this chapter,
4 for projects on the state highway system, the department is the
5 responsible agency for the performance of project development
6 services, including performance specifications, preliminary
7 engineering, prebid services, the preparation of project reports and
8 environmental documents, and construction inspection services.
9 The department is also the responsible agency for the preparation
10 of documents that may include, but need not be limited to, the size,
11 type, and desired design character of the project, performance
12 specifications covering the quality of materials, equipment, and
13 workmanship, preliminary plans, and any other information deemed
14 necessary to describe adequately the needs of the department or
15 regional transportation agency.

16 (B) The department may use department employees or
17 consultants to perform the services described in subparagraph (A),
18 consistent with Article XXII of the California Constitution.
19 Department resources, including personnel requirements, necessary
20 for the performance of those services shall be included in the
21 department's capital outlay support program for workload purposes
22 in the annual Budget Act.

23 (2) The department or a regional transportation agency may
24 exercise any power possessed by it with respect to transportation
25 projects to facilitate the transportation projects pursuant to this
26 section. The department, regional transportation agency, and other
27 state or local agencies may provide services to the contracting
28 entity or lessee for which the public entity is reimbursed, including,
29 but not limited to, planning, environmental planning, environmental
30 certification, environmental review, preliminary design, design,
31 right-of-way acquisition, construction, maintenance, and policing
32 of these transportation projects. The department or regional
33 transportation agency, as applicable, shall regularly inspect the
34 facility and require the contracting entity or lessee to maintain and
35 operate the facility according to adopted standards. Except as may
36 otherwise be set forth in the lease agreement, the contracting entity
37 or lessee shall be responsible for all costs due to development,
38 maintenance, repair, rehabilitation, and reconstruction, and
39 operating costs.

1 ~~(g) (1) In selecting private entities with which to enter into~~
2 ~~these agreements, notwithstanding any other provision of law, the~~
3 ~~department and regional transportation agencies may utilize, but~~
4 ~~are not limited to utilizing, one or more of the following~~
5 ~~procurement approaches:~~

6 ~~(A) Solicitations of proposals for defined projects and calls for~~
7 ~~project proposals within defined parameters.~~

8 ~~(B) Prequalification and short-listing of proposers prior to final~~
9 ~~evaluation of proposals.~~

10 ~~(C) Final evaluation of proposals based on qualifications and~~
11 ~~best value. The California Transportation Commission shall~~
12 ~~develop and adopt criteria for making that evaluation prior to~~
13 ~~evaluation of a proposal.~~

14 ~~(D) Negotiations with proposers prior to award.~~

15 ~~(E) Acceptance of unsolicited proposals, with issuance of~~
16 ~~requests for competing proposals. Neither the department nor a~~
17 ~~regional transportation agency may award a contract to an~~
18 ~~unsolicited bidder without receiving at least one other responsible~~
19 ~~bid.~~

20 ~~(2) When evaluating a proposal submitted by the contracting~~
21 ~~entity or lessee, the department or the regional transportation~~
22 ~~agency may award a contract on the basis of the lowest bid or best~~
23 ~~value.~~

24 ~~(h) The contracting entity or lessee shall have the following~~
25 ~~qualifications:~~

26 ~~(1) Evidence that the members of the contracting entity or lessee~~
27 ~~have completed, or have demonstrated the experience, competency,~~
28 ~~capability, and capacity to complete, a project of similar size,~~
29 ~~scope, or complexity, and that proposed key personnel have~~
30 ~~sufficient experience and training to competently manage and~~
31 ~~complete the design and construction of the project, and a financial~~
32 ~~statement that ensures that the contracting entity or lessee has the~~
33 ~~capacity to complete the project.~~

34 ~~(2) The licenses, registration, and credentials required to design~~
35 ~~and construct the project, including, but not limited to, information~~
36 ~~on the revocation or suspension of any license, credential, or~~
37 ~~registration.~~

38 ~~(3) Evidence that establishes that members of the contracting~~
39 ~~entity or lessee have the capacity to obtain all required payment~~

~~1 and performance bonding, liability insurance, and errors and
2 omissions insurance.~~

~~3 (4) Evidence that the contracting entity or lessee has workers'
4 compensation experience, history, and a worker safety program
5 of members of the contracting entity or lessee that is acceptable
6 to the department or regional transportation agency.~~

~~7 (5) A full disclosure regarding all of the following with respect
8 to each member of the contracting entity or lessee during the past
9 five years:~~

~~10 (A) Any serious or willful violation of Part 1 (commencing with
11 Section 6300) of Division 5 of the Labor Code or the federal
12 Occupational Safety and Health Act of 1970 (P.L. 91-596).~~

~~13 (B) Any instance where members of the contracting entity or
14 lessee were debarred, disqualified, or removed from a federal,
15 state, or local government public works project.~~

~~16 (C) Any instance where members of the contracting entity or
17 lessee, or its owners, officers, or managing employees submitted
18 a bid on a public works project and were found to be nonresponsive
19 or were found by an awarding body not to be a responsible bidder.~~

~~20 (D) Any instance where members of the contracting entity or
21 lessee, or its owners, officers, or managing employees defaulted
22 on a construction contract.~~

~~23 (E) Any violations of the Contractors' State License Law
24 (Chapter 9 (commencing with Section 7000) of Division 3 of the
25 Business and Professions Code), including, but not limited to,
26 alleged violations of federal or state law regarding the payment of
27 wages, benefits, apprenticeship requirements, or personal income
28 tax withholding, or Federal Insurance Contributions Act (FICA)
29 withholding requirements.~~

~~30 (F) Any bankruptcy or receivership of any member of the
31 contracting entity or lessee, including, but not limited to,
32 information concerning any work completed by a surety.~~

~~33 (G) Any settled adverse claims, disputes, or lawsuits between
34 the owner of a public works project and any member of the
35 contracting entity or lessee during the five years preceding
36 submission of a bid under this article, in which the claim,
37 settlement, or judgment exceeds fifty thousand dollars (\$50,000).
38 Information shall also be provided concerning any work completed
39 by a surety during this five-year period.~~

1 (H) If the contracting entity or lessee is a partnership, joint
2 venture, or an association that is not a legal entity, a copy of the
3 agreement creating the partnership or association that specifies
4 that all general partners, joint venturers, or association members
5 agree to be fully liable for the performance under the agreement.

6 (i) No agreement entered into pursuant to this section shall
7 infringe on the authority of the department or a regional
8 transportation agency to develop, maintain, repair, rehabilitate,
9 operate, or lease any transportation project. Lease agreements may
10 provide for reasonable compensation to the contracting entity or
11 lessee for the adverse effects on toll revenue or user fee revenue
12 due to the development, operation, or lease of supplemental
13 transportation projects with the exception of any of the following:

14 (1) Projects identified in regional transportation plans prepared
15 pursuant to Section 65080 of the Government Code.

16 (2) Safety projects.

17 (3) Improvement projects that will result in incidental capacity
18 increases.

19 (4) Additional high-occupancy vehicle lanes or the conversion
20 of existing lanes to high-occupancy vehicle lanes.

21 (5) Projects located outside the boundaries of a public-private
22 partnership project, to be defined by the lease agreement.

23 However, compensation to a contracting entity or lessee shall
24 only be made after a demonstrable reduction in use of the facility
25 resulting in reduced toll or user fee revenues, and may not exceed
26 the difference between the reduction in those revenues and the
27 amount necessary to cover the costs of debt service, including
28 principal and interest on any debt incurred for the development,
29 operation, maintenance, or rehabilitation of the facility.

30 (j) (1) Agreements entered into pursuant to this section shall
31 authorize the contracting entity or lessee to impose tolls and user
32 fees for use of a facility constructed by it, and shall require that
33 over the term of the lease the toll revenues and user fees be applied
34 to payment of the capital outlay costs for the project, the costs
35 associated with operations, toll and user fee collection,
36 administration of the facility, reimbursement to the department or
37 other governmental entity for the costs of services to develop and
38 maintain the project, police services, and a reasonable return on
39 investment. The agreement shall require that, notwithstanding
40 Sections 164, 188, and 188.1, any excess toll or user fee revenue

1 either be applied to any indebtedness incurred by the contracting
2 entity or lessee with respect to the project, improvements to the
3 project, or be paid into the State Highway Account, or for all three
4 purposes, except that any excess toll revenue under a lease
5 agreement with a regional transportation agency may be paid to
6 the regional transportation agency for use in improving public
7 transportation in and near the project boundaries.

8 (2) Lease agreements shall establish specific toll or user fee
9 rates. Any proposed increase in those rates not otherwise
10 established or identified in the lease agreement during the term of
11 the agreement shall first be approved by the department or regional
12 transportation agency, as appropriate, after at least one public
13 hearing conducted at a location near the proposed or existing
14 facility.

15 (3) The collection of tolls and user fees for the use of these
16 facilities may be extended by the commission or regional
17 transportation agency at the expiration of the lease agreement.
18 However, those tolls or user fees shall not be used for any purpose
19 other than for the improvement, continued operation, or
20 maintenance of the facility.

21 (k) Agreements entered into pursuant to this section shall include
22 indemnity, defense, and hold harmless provisions agreed to by the
23 department or regional transportation agency and the contracting
24 entity or lessee, including provisions for indemnifying the State
25 of California or the regional transportation agency against any
26 claims or losses resulting or accruing from the performance of the
27 contracting entity or lessee.

28 (l) The plans and specifications for each transportation project
29 on the state highway system developed, maintained, repaired,
30 rehabilitated, reconstructed, or operated pursuant to this section
31 shall comply with the department's standards for state
32 transportation projects. The lease agreement shall include
33 performance standards, including, but not limited to, levels of
34 service. The agreement shall require facilities on the state highway
35 system to meet all requirements for noise mitigation, landscaping,
36 pollution control, and safety that otherwise would apply if the
37 department were designing, building, and operating the facility.
38 If a facility is on the state highway system, the facility leased
39 pursuant to this section shall, during the term of the lease, be
40 deemed to be a part of the state highway system for purposes of

1 identification, maintenance, enforcement of traffic laws, and for
2 the purposes of Division 3.6 (commencing with Section 810) of
3 Title 1 of the Government Code.

4 (m) Failure to comply with the lease agreement in any significant
5 manner shall constitute a default under the agreement and the
6 department or the regional transportation agency, as appropriate,
7 shall have the option to initiate processes to revert the facility to
8 the public agency.

9 (n) The assignment authorized by subdivision (c) of Section
10 130240 of the Public Utilities Code is consistent with this section.

11 (o) A lease to a private entity pursuant to this section is deemed
12 to be public property for a public purpose and exempt from
13 leasehold, real property, and ad valorem taxation, except for the
14 use, if any, of that property for ancillary commercial purposes.

15 (p) Nothing in this section is intended to infringe on the authority
16 to develop high-occupancy toll lanes pursuant to Section 149.4,
17 149.5, or 149.6.

18 (q) Nothing in this section shall be construed to allow the
19 conversion of any existing nontoll or nonuser-fee lanes into tolled
20 or user fee lanes with the exception of a high-occupancy vehicle
21 lane that may be operated as a high-occupancy toll lane for vehicles
22 not otherwise meeting the requirements for use of that lane.

23 (r) The lease agreement shall require the contracting entity or
24 lessee to provide any information or data requested by the
25 California Transportation Commission or the Legislative Analyst.
26 The commission, in cooperation with the Legislative Analyst, shall
27 annually prepare a report on the progress of each project and
28 ultimately on the operation of the resulting facility. The report
29 shall include, but not be limited to, a review of the performance
30 standards, a financial analysis, and any concerns or
31 recommendations for changes in the program authorized by this
32 section.

33 (s) Notwithstanding any other provision of this section, no lease
34 agreement may be entered into pursuant to the section that affects,
35 alters, or supersedes the Memorandum of Understanding (MOU),
36 dated November 26, 2008, entered into by the Golden Gate Bridge
37 Highway and Transportation District, the Metropolitan
38 Transportation Commission, and the San Francisco County
39 Transportation Authority, relating to the financing of the U.S.

1 ~~Highway 101/Doyle Drive reconstruction project located in the~~
2 ~~City and County of San Francisco.~~

3 ~~(t) No lease agreements may be entered into under this section~~
4 ~~on or after January 1, 2017.~~

5 ~~SEC. 6.~~

6 *SEC. 5.* No reimbursement is required by this act pursuant to
7 Section 6 of Article XIII B of the California Constitution because
8 the only costs that may be incurred by a local agency or school
9 district will be incurred because this act creates a new crime or
10 infraction, eliminates a crime or infraction, or changes the penalty
11 for a crime or infraction, within the meaning of Section 17556 of
12 the Government Code, or changes the definition of a crime within
13 the meaning of Section 6 of Article XIII B of the California
14 Constitution.